DAVID E. MILLS (Pro Hac Vice Pending)
KARA D. LITTLE (Pro Hac Vice Pending)
DOW, LOHNES & ALBERTSON, PLLC
1200 New Hampshire Avenue, N.W., Suite 800
Washington, D.C. 20036-6802
Telephone: (202) 776-2000
Facsimile: (202) 776-2222

RICHARD R. PATCH (Stale Bar 088049)
COBLENTZ, PATCH, DUFFY & BASS, LLP
222 Keamy Street, 7th Floor
San Francisco, California 94108-4510
Telephone: (415) 391-4800
Facsimile: (415) 989-1663

Attorneys for Defendant Cox Business Services

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

REDEFINING PROGRESS, a California Non-Profit Corporation, on behalf of itself and all others similarly situated, and on behalf of the general public,

Plaintiff,

vs

FAX.COM, INC; KEVIN KATZ; COX BUSINESS SERVICES, L.L.C.; AMERICAN BENEFIT MORTGAGE, INC, and all others similarly situated; and DOES 1 through 10,0000,

Defendants.

Case No.: C 02-4057 MJJ

NOTICE OF MOTION AND MOTION OF COX BUSINESS SERVICES TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION, FOR FAILURE TO STATE A CLAIM AND BASED ON PRIMARY JURISDICTION OF FEDERAL COMMUNICATIONS COMMISSION; MEMORANDUM OF POINTS AND AUTHORITIES

Date: November 19,2002
Time: 9:30 a.m.
Ctrm: Hon. Martin J. Jenkins

TABLE OF CONTENTS

Page

I. STATEMENT OF ISSUES 1

II. INTRODUCTION 1

III. RELEVANT FACTUAL ALLEGATIONS 3

IV. ARGUMENT 5

A. There Is No Private Cause Of Action In Federal Court Under The TCPA, And Section 207 Cannot Supply Subject Matter Jurisdiction Here 5

B. Even If Section 207 Could Supply Jurisdiction For Private TCPA Claims, Plaintiff Fails To Allege Facts Sufficient To Establish Carrier Liability 9

1. Common Carriers Generally Are Not Liable For The Content Of Transmissions Of Others Over Their Networks 11

2. Common Carriers Generally Are Not Liable Under The TCPA For The Facsimile Transmissions Of Others Over Their Networks 12

3. Plaintiff Fails To Allege Facts Sufficient To Show That Cox Has Violated The TCPA By Any Unlawful Act Or Omission 15

C. The Court Should Dismiss Plaintiffs Remaining Claims 18

D. Even If There Were A Federal Claim, The Court Should Dismiss Based On The Primary Jurisdiction Of The FCC 20

V. CONCLUSION 24

TABLE OF AUTHORITIES

CASES AND ORDERS

In re Amendment of Parts 2, 91 and 99 of the Commission's Rules Insofar As They Relate to the Industrial Radiolocation Service, Report and Order, 5 F.C.C.2d 197 (1966) 11

AT&T Co. v. Intrend Ropes & Twine, Inc., 1996 U.S. Dist. LEXIS 16991 (C.D. Ill. 1996) 17

AT&T Communications of Cal., Inc. v. Pacific Bell, 60 F. Supp. 2d 997 (N.D. Cal. 1999) 6

AT&T Corp. v. PAB, Inc., 935 F. Supp. 584 (E.D. Pa. 1996) 21-22

AT&T Co. v. United Artists Payphone Corp., 852 F. Supp. 221 (S.D.N.Y. 1994), aff'd, 39 F.3d 411 (2d Cir. 1994) 10

Acri v. Varian Associates, Inc., 114 F.3d 999 (9th Cir. 1997) supplemented, 121 F.3d 714 (9th Cir. 1997) 19

Atlantic Coast Line R.R. v. Riverside Mills, 219 U.S. 186 (1911) 10

Balistreri v. Pacifica Police Dep't, 901 F.2d 696 (9th Cir. 1990) 5

Bonime v. Primetime TV. LLC, Case No. BC269742 (Los Angeles County Court, filed Sept. 4, 2002) 19

Brown v. General Sews. Admin., 425 U S . 820 (1976) 9

Carpenter v. Dep't of Transp., 13 F.3d 313 (9th Cir. 1994) 8

Chair King, Inc. v. Houston Cellular Corp., 131 F.3d 507 (5th Cir. 1997) 7

City of Auburn v. Qwest Corp., 260 F.3d 1160 (9th Cir. 2001), cert. denied, 122 S. Ct. 809 (2002) 19

City of Seattle v. FERC, 923 F.2d 713 (9th Cir. 1991) 13

Connors v. Amax Coal Co., 858 F.2d 1226 (7th Cir. 1988) 8

Cost Mgmt. Sews. v. Washington Natural Gas Co., 99 F.3d 937 (9th Cir. 1996) 20

Dougan v. FCC, 21 F.3d 1488 (9th Cir. 1994) 8

In re Enforcement of Prohibits Against the Use of Common Carriers for the Transmission of Obscene Materials, Memorandum Opinion, Declaratory Ruling and Order, 2 F.C.C.R. 2819 (1987) 13, 16, 17

ErieNet, Inc. v. Velocity Net, Inc., 156 F.3d 513 (3d Cir. 1998) 7

FCC v. Midwest Video Corn., 440 U.S. 689 (1979) 11

Far East Conference v. United States, 342 U.S. 570 (1952) 23

Feldman v. Glaze, No. C-87-20723-WAI, 1988 WL 216813 (N.D. Cal. May 12, 1988) 5

Forsberg v. Pac. Northwest Bell Tel. Co., 840 F.2d 1409 (9th Cir. 1988) 19

Foxhall Realty Law Offices, Inc. v. Telecommunications Premium Sews., Ltd., 156 F.3d 432 (2d Cir. 1998) 7

Frenkel v. Western Union Tel. Co., 327 F. Supp. 954 (D. Md. 1971) 6

Friends of Frederick Seig Grove #94 v. Sonoma County Water Agency, 124 F. Supp. 2d 1161 (N.D. Cal. 2000) 5

GTE.Net LLC v. Cox Communications, Inc., 185 F. Supp. 2d 1141 (S.D. Cal. 2002) 23

Goldin v. Public Utils. Comm'n, 592 P.2d 289 (Cal. 1979) 18

Hellon & Assocs. Inc. v. Phoenix Resort Corn., 958 F.2d 295 (9th Cir. 1992) 9

Holden v. Hagopian, 978 F.2d 11 *15* (9th Cir. 1992) 5

Howard v. America Online Inc., 208 F.3d 741 (9th Cir.), cert. denied, 531 U.S. 828 (2000) 17

Incomco v. Southern Bell Telephone & Telegraph Co., 558 F.2d 751 (5th Cir. 1977) *6*

Informix Software, Inc. v. Oracle Corp., 927 F. Supp. 1283 (N.D. Cal. 1996) 5

International Science & Technology Institute, Inc. v. Inacom Communications. Inc., 106 F.3d 1146 (4th Cir. 1997) 7

Ivy Broadcasting Co. v. AT&T Co., 391 F.2d 486 (2d Cir. 1968) 6

Kaufman & Vans. Inc. v. ACS Systems, Inc., Case Nos. BC 240588, BC 240573 (Los Angeles County Superior Court, filed Dec. 19, 2001) 19

Kenney v. Deloitte, Haskins & Sells, No. CY1-0590 BAC, 1992 WL 551108 (N.D. Cal. Nov. 23, 1992) 5

Kirsch v. Fax.com, Inc., No. 81-0516 (Ca. Sup. Ct. Aug. 22, 2002) 4

Lutz Appellate Sews., Inc. v. Curry, 859 F. Supp. 180 (E.D.Pa. 1994) 15

MCJ Communications Corn. v. AT&T Co., 496 F.2d 214 (3d Cir. 1974) 23

MCI Telecommuncations Corn. v. FCC, 917 F.2d 30 (D.C. Cir. 1990) 10

Mack v. South Bay Beer Distribs., Inc., 798 F.2d 1279 (9th Cir. 1986) 14

Mason v. Western Union Telegraph Company, 52 Cal. App. 3d 429 (1975) 17

McGlinchy v. Shell Chemical Co., 845 F.2d 802 (9th Cir. 1988) 5

Mendiola v. South San Francisco Unified School District, No. C-95-2793, 1996 WL 53635 (N.D. Cal. Jan. 31, 1996) 19

Missouri ex rel. Nixon v. American Blast **Fax.** Inc., 196 F. Supp. 2d 920 (E.D. Mo. 2002) 16

Murphey v. Lanier, 204 F.3d 911 (9th Cir. 2000) 6, 7

National Ass'n of Regulatory Util. Comm'rs v. FCC, 533 F.2d 601 (D.C. Cir. 1976) 11

Nicholson v. Hooters of Augusta. Inc., 136 F.3d 1287 (11th Cir.), modified 140 F.3d 898 (11th Cir. 1998) 7

O'Brien v. Western Union Telegraph Co., 113 F.2d 539 (1st Cir. 1940) 12

Owner-Operators Indep. Drivers Ass'n **v.** Skinner, 931 F.2d 582 (9th Cir. 1991) 8

Pacific Tel. & Tel. Co. v. MCI Telecomm. Corn., 649 F.2d 1315 (9th Cir. 1981) 21

People v. Brophy, 120 P.2d 946 (Cal. Ct. App. 1950) 17

Phonetele, Inc. v. AT&T Co., 664 F.2d 716 (9th Cir. 1981), modified, Nos. 77-3877, 77-2936, 1982 WL 11277 (9th Cir. Mar. 15, 1982) 22

Port of Boston Marine Terminal Ass'n v. Rederiaktiebolaget Transatlantic, 400 U.S. 62 (1970) 20

Qwest Communications Corp. v. City of Berkeley, 146 F. Supp. 2d 1081 (N.D. Cal. 2001) 19

Randolph v. Budget Rent-A-Car, 97 F.3d 319 (9th Cir. 1996) 18

In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Notice of Proposed Rulemaking, FCC 02-250, CG Docket No. 02-278 (Sept. 18, 2002) available at http://www.fcc.gov/headlines.html 4, 5

In re Rules and Regulations Implementing The Telephone Consumer Protection Act of 1991, Report and Order, 7 F.C.C.R. 8752 (1992) 13, 15, 16, 22

In re Rules and Regulations Implementing The Telephone Consumer Protection Act of 1991, Memorandum Opinion and Order, 10 F.C.C.R. 12391 (1995) 14

Sable Communications of Ca.. Inc. v. Pacific Tel. & Tel. Co., Nos. 84-469, 84-549, 1984 U.S. Dist. LEXIS 19524 (C.D. Cal. Feb. 13, 1984) 12, 13, 16

Schmier v. United States Ct. of Appeals for the Ninth Cir., 279 F.3d 817 (9th Cir. 2002) 15

In re Silicon Graphics. Inc. Securities Litig., 970 F. Supp. 746 (N.D. Cal. 1997) 5

Sprint Corp. v. Evans, 818 F. Supp. 1447 (M.D. Ala. 1993) 17

Sprint Corp. v. Evans, 846 F. Supp. 1497 (M.D. Ala. 1994) 22, 23

State of Missouri v. American Blast Fax. Inc., No. 4:00CV933-SNL (Aug. 29, 2002) 16

Sutta ex rel. Sutta v. Acalanes Union High School District, No. C01-1519 19

Ting v. AT&T, 182 F. Supp. 2d 902 (N.D. Cal. 2002) 14

U.S.A. Nutrasource. Inc. v. CNA Ins. Co., 140 F. Supp. 2d 1049 (N.D. Cal. 2001) 14

United Artists Theatre Circuit, Inc. v. FCC, 147 F. Supp. 2d 965 (D. Ariz. 2000) 7, 8, 18

United States v. General Dynamics Corp., 828 F.2d 1356 (9th Cir. 1987) 20

United States v. Western Pac. R.R., 352 U.S. 59 (1956) 20

United States v. Yellow Freight Sys., Inc., 762 F.2d 737 (9th Cir. 1985) 20

Western Mining Council v. Watt, 643 F.2d 618 (9th Cir. 1981) 5

Western Union Telegraph Co. v. Brown, 294 F. 167 (8th Cir. 1923) 12

Western Union Telegraph v. Lesesne, 182 F.2d 135 (1950) 12

Writers Guild of *Am.*, West Inc. v. ***Am.*** Broad. Co., 609 F.2d 355 (9th Cir. 1979) 22

STATUTES & REGULATIONS

18 U.S.C. § 1084(d) 17

28 U.S.C. § 1367 ..... **6**

47 U.S.C. § 151 21

47 U.S.C. § 153(43) & (44) 11

47 U.S.C. § 201 11

47 U.S.C. § 206 ..... 5, 6, 10

47 U.S.C. § 207 ..... 5, 6, 9

47 U.S.C. § 227 ..... *passim*

47 U.S.C. § 502(b)(4) 16

47 U.S.C. § 503(b)(2)(B) 11

Cal. Bus. & Prof. Code § 17538 19

Fed. R. Civ. P. 12(b)(1), (6) 1

LEGISLATIVE MATERIALS

H.R. Rep. No. 95-1395 (1978) 10

Revised Interstate Commerce Act, 49 U.S.C. § 11705, Pub. L. No. 95-473, 92 Stat, 1337 (1978) 10

S. Rep. No. 102-178 (1991) 12

129 Cong. Rec. H 10559 (**Part II**, daily ed., Nov. 18, 1983) (statement of Rep. Bliley) 13

129 Cong. Rec. S 16866 (Part II, daily ed., Nov. 18, 1983)
(statement of Sen. Trible) 13

OTHER MATERIALS

Peter W. Huber et al., Federal Telecommunications Law (2d ed. 1999) 12

California Public Utilities Commission, Opinion After Further Hearing,
Case No. 4930, Decision No. 91188 (Appendix A 1980) 18

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on November 19,2002, at 9:30 a.m., or as soon thereafter as the matter may be heard in the Courtroom of the Honorable Martin J. Jenkins, defendant Cox California Telcom, L.L.C., doing business as Cox Business Services *("Cox"),* erroneously named in the complaint as Cox Business Services, L.L.C., by and through counsel, will respectfully move the Court to dismiss plaintiff's complaint in its entirety.

Cox moves to dismiss plaintiffs complaint for lack of subject matter jurisdiction, for failure to stale a claim, and based on the primary jurisdiction of the Federal Communications Commission pursuant to Fed. R. Civ. P. 12(b)(1), (6) and L.R. 7.

MEMORANDUM OF POINTS AND AUTHORITIES

I. STATEMENT OF ISSUES

The issues presented in this case arc: (1) whether the federal district court has subject matter jurisdiction over a private claim under 47 U.S.C. § 207 based on an allegation that a common carrier is liahlc for violations of the Telephone Consumer Protection Act of 1991, 47 U.S.C. § 227, when Congress deliberately assigned exclusive jurisdiction over private TCPA claims to state courts; (2) whcthcr the complaint states a claim against a common carrier for violation of the TCPA where the only facts alleged are the provision of common carrier services; and *(3)* whether this Court should defer to the primary jurisdiction of the Federal Communications Commission on the plaintiffs novel theory that telecommunications service common carriers can be held liable under the TCPA for the facsimile transmissions of its customers ovcr the common carrier's network.

II. INTRODUCTION

The only asserted basis for federal jurisdiction is Section 207 of the Communications Act of 1934, as amended, (the "Act"). 47 U.S.C. § 207, which authorizes federal claims against common carriers for violations of some other provision of the Act. Plaintiff alleges that Cox, as a common carrier, is violating the Telephone Consumer Protection Act of 1991 ("TCPA"), 47 U.S.C. § 227. The TCPA prohibits sending unsolicited facsimile advertisements to consumers absent invitation, consent, or an established business relationship. In enacting the TCPA, however, Congress deliberately assigned

jurisdiction over private claims exclusively to state courts (if permitted by state law), as the Ninth Circuit and every other Circuit to consider the issue has held. Congress' specific exclusion of federal jurisdiction over private claims trumps the general grant of jurisdiction for claims against common carriers in Section 207. This case really is about whether Fax.com and its advertising customers are violating the TCPA by sending unsolicited facsimile advcrtisements, and plaintiff cannot use Cox as a tool to manufacture federal jurisdiction over TCPA claims, circumventing clear congressional intent.

Even if there were any basis for federal jurisdiction, however, the complaint fails to state a federal claim against a common carrier under Sections 206, 207 or 227 of the Act. As a matter of law and common sense, common carriers cannot be held liable for the content of transmissions over their networks except in the most extraordinary circumstances. Whether transmission services are used for libel, obscenity, illegal copyright distribution or gambling, the law generally does not hold the common carriers responsible, and for good reason. Surely, citizens do not want their telecommunications companies to screen their calls. emails, faxes or any other transmissions, and (fortunately) the law does not permit it. Any other system would fundamentally alter the nature, privacy and reliability of telecommunications in this country.

Nonetheless, plaintiff sues Cox as a telecommunications common carrier, seeking to hold it responsible under the TCPA for the content of facsimile transmissions allegedly sent over its network by others. The complaint alleges only that Cox provides a common carrier service, not that it is otherwise involved in Fax.com's fax broadcasting business. Indeed, contrary to plaintiffs allegations, broadcast faxing is not illegal per se: unsolicited fax advertisements are permitted by invitation, by consent or where there is an established business relationship, and unsolicited faxes that are not "advertiscments" are not covered by the statute. In addition, one federal court has enjoined FCC action against Fax.com based on the court's ruling that the TCPA violates Fax.com's constitutional speech rights. Under these circumstances, there is no legal basis to hold *Cox* responsible as a common carrier for failure to screen or prevent such transmissions. Plaintiff merely alleges that Cox provides a highly reliable common carrier network that Fax.com uses and necds for its broadcast fax business and that Cox knows Fax.com

is in the broadcast fax business. As a matter of law, such allegations are insufficient to state a claim against a common carrier, regardless of the content of the transmissions over its network.

Finally, in the event the Court determines that federal jurisdiction exists but declines to dismiss for failure to state a claim, the case should be dismissed and referred based on the primary jurisdiction the Federal Communications Commission ("FCC"). The FCC recently initiated a rulemaking proceeding to address several issues under the TCPA, including the same issues of common carrier liability implicated in the complaint. Congress entrusted the FCC with responsibility both to regulate common carriers and to establish a national regulatory scheme to address unsolicited telemarketing an facsimile transmissions. There is great need for uniformity in the administration of these two regulate areas, particularly as to the potential liability of common carriers under the TCPA and the implication: of imposing duties on common carricrs regarding the content of such transmissions over their network Congress intended that these issues would be resolved by FCC administrative regulation, not by judici decree.

III. RELEVANT FACTUAL ALLEGATIONS

As alleged in the complaint, and assumed true solely for purposes of this motion, Fax.com is in the broadcast fax business, and assists its clients in preparing and sending facsimile advertisements to potential customers. (Compl. ¶ 35.) Plaintiff asserts that Fax.com has developed "the world's largest database of fax numbers" (id. ¶ 19), "has broadcasted over three million faxes per day" (id. ¶ 20), "actively assists its fax broadcasting clients 'to develop and plan a complete fax campaign . . . .'" (id. ¶ 23), "assists in creating a regular schedule of fax broadcasting. targeting select groups of potential customers with custom designed fax ads" (id.), and "actively helps its fax broadcasting clients to desig ads for their business" (id. ¶ 24).

According to the complaint, Cox is a common carrier that provides its customers with a "fiber optic-based broadband network" to provide "advanced communications services." (Id. ¶ 18.) Fax.con is one of Cox's customers, and I:ax.com uses the Cox network and infrastructure to market to compani through fax broadcast documents. (Id. ¶ 35.) Fax.com selected Cox to provide telecommunications

services because Cox is a "reliable telephone service provider." (Id. ¶ 35.) Plaintiff alleges that Cox provides T1 lines (including 40 private lines for employees), Internet access, data transfer and video services to Fax.com. (Compl. ¶ *36.)* Cox's "technology provides an uninterrupted connection" to Fax.com, and "end-to-end management of its network infrastructure." (Id. ¶ 37.) Cox allegedly "provides all of Fax.com's business needs" so that Fax.com gets all the services it needs from "one carrier.'' including "customized" and "personalized" service. (Id. ¶ **38.)** Fax.com believes Cox is "a little easier to deal with than some ofthe other phone companies." (Id.)

Although the complaint states a conclusion that **Cox** "had a high degree of involvement or actual notice of Fax.com's fax broadcasting and marketing tactics" (Compl. ¶¶ 35, 78), there are no factual allegations that Cox as a common carrier participates in Fax.com's business other than to provide fast and reliable common carrier services.

The FCC has issued four notices to Fax.com suggesting that its conduct in fax broadcasting unsolicited advertisements might violate the TCPA. On August 7,2002, the FCC issued a Notice of Apparenl Liability for Forfeiture against t:ax.com ("NAL"). (Id. ¶¶ 30-33.) One of the citations and the NAL are attached hereto as Exhibits **A** and B, respectively.

On August 22, 2002, the same day this class action **was** filed, virtually the same class action was filed against Fax.com and other defendants (but not naming Cox) in California Superior Court by the same lawyers. Kirsch v. Fax.com, Inc., et al., No. 81-0516 (Ca. Sup. Ct. Aug. 22, 2002). The two suits contain nearly identical allegations, claims, class definitions, and demands for damages and class counsel fees.

On September 18, 2002, the FCC released a Notice of Proposed Rulemaking and Memorandum Opinion and Ordcr. In re Rules and Regulations Implementing the Telephone Consumer Protection Ac of 1991, Notice of Proposed Rulemaking, FCC 02-250, CG Docket No. 02-278 (Sept. 18, 2002), available at http://www.fcc.gov/headlines.html (the "NPRM"). The NPRM seeks comments addressing (among other things) whether the FCC should revise its rules governing unsolicited facsimile advertisements and the degree of involvement fax broadcasters must have in the fax advertising of their

clients to be liable under the TCPA (making multiple references to Fax.com, id. at 7 n.40, 26 n.155) and common carrier issues.

IV. ARGUMENT

"Pursuant to Rule 12(b)(1), a district court must dismiss an action if it lacks jurisdiction over the subject matter of the suit." Friends of Frederick Seig Grove #94 v. Sonoma County Water Agency, 124 F. Supp. 2d 1161, 1164 (N.D. Cal. 2000). Dismissal under Rule 12(b)(6) "can be based on the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory." Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir. 1990).

"Legal conclusions need not be taken as true merely because they are cast in the form of factual allegations. however." In re Silicon Graphics. Inc. Securities Litig., 970 F. Supp. 746, 751 (N.D. Cal. 1997) (quoting Western Mining Council v. Watt, 643 F.2d 618, 624 (9th Cir. 1981)). And "[c]onclusory allegations, unsupported by the facts alleged, need not be accepted as true." Informix Software, Inc. v. Oracle Corp., 927 F. Supp. 1283, 1285 (N.D. Cal. 1996) (quoting Holden v. Hagopian, 978 F.2d 1115, 1121 (9th Cir. 1992)). See also McGlinchy v. Shell Chemical Co., 845 F.2d 802, 810 (9th Cir. 1988); Kenney v. Deloitte, Haskins & Sells, No. C 91-0590 BAC, 1992 WL 551108, at *4 (N.D. Cal. Nov. 23, 1992) (failure to set forth more than conclusory allegations); Feldman v. Glaze, No. C-87-20723-WAI, 1988 WL 216813, at *2 (N.D. Cal. May 12, 1988) (complaint insufficient because it contained "only conclusory allegations regarding knowledge, or any inference thereof, by the [defendants]").

A. There Is No Private Cause Of Action In Federal Court Under The TCPA, And Section 207 Cannot Supply Subject Matter Jurisdiction Here.

The only claim in the complaint purporting to invoke federal jurisdiction is the Second Cause of Action, which alleges that Cox, as a conimon carrier, is subject to liability and suit in federal district court under Sections 206 and 207 of the Communications Act.[1] It is well settled, however, that those

---

[1] Section 206 provides in relevant part:

> In case any common carrier shall do. or cause or permit to be done, any act, matter, or thing in this Act prohibited or declared to be unlawful . . . such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this Act. . . .

Sections do not create an independent federal cause of action; a plaintiff must show that the common carrier has violated some other specific provision of the Act. See AT&T Communications of Cal., Inc. v. Pacific Bell, 60 F. Supp. 2d 997, 1000 (N.D. Cal. 1999) (subject matter jurisdiction lacking in part because Section 206 does not create an independent right of action in federal court); Incomco v. Southern Bell Tel. & Tel. Co., 558 F.2d 751, 753 (5th Cir. 1977) (no violation of Act was presented to support action under Sections 206 or 207); Ivy Broadcasting Co. v. AT&T Co., 391 F.2d 486,489 (2d Cir. 1968) ("'The Communications Act. §§ 206. 207, provides that a suit may be brought in federal court 'or damages resulting from a common carrier's violation of specific provisions of the Act . . . .").[2]

The Second Cause of Action alleges that Cox is subject to liability under Sections 206 and 207 based solely on violations of the TCPA. With several exceptions, the TCPA prohibits any person from using "any telephone facsimile machine, computer, or other device to send an unsolicited advertisement to a telephone facsimile machine.'' 47 U.S.C. § 227(b)(1)(C). The statute expressly provides for a private right of action in state court, if such an action is otherwise permitted under the rules or laws of that State. Id. § 227(b)(3).

Plaintiff does not allege original federal jurisdiction directly under the TCPA, however, and for good reason.3 The Ninth Circuit squarely held in Murphey v. Lanier, 204 F.3d 911,915 (9th Cir. 2000), that Congress vested exclusive jurisdiction in state courts to hear private TCPA claims:

> We join the Second, Third, Fourth, Fifth and Eleventh Circuits in the somewhat unusual conclusion that state courts have exclusive jurisdiction over a cause of action created by a federal statute, the Telephone Consumer Protection Act of 1991.

---

47 U.S.C. § 206. Section 207 allows suit in district court by any person damaged by a common carrier, 'for the recovery of the damages for which such common carrier may be liable under the provisions of this Act." 47 U.S.C. § 207.

Section 206 merely creates a remedy and does not confer federal jurisdiction. Frenkel v. Western Union Tel. Co., 327 F. Supp. 954, 958 (D. Md. 1971) ("§ 206 cannot be relied on as the provision violated in invoking the jurisdiction of a federal court under § 207").

The complaint includes a separate TCPA claim but purports to bring it pursuant to the Court's supplemental jurisdiction, 28 U.S.C. § 1367, which fails for the reasons set forth in Section C, below.

Id.[4] As the Ninth Circuit made clear in Murphey, it was a deliberate decision of Congress lo vest exclusive jurisdiction in state courts over private TCPA claims:

> [T]he conclusion that there is no federal jurisdiction over private actions under the TCPA . . . [is based on] the statute's express mention of state court jurisdiction and its silence on the matter of federal jurisdiction. Because federal court jurisdiction is limited to that conferred by Congress, the express reference to state court jurisdiction does not mean that federal jurisdiction also exists; instead, the failure to provide for federal jurisdiction indicates that there is none.

Murphey, 204 F.3d at 914 (citing several other decisions and noting the contrast between congressional silence here and explicit grants of federal jurisdiction elsewhere in Act).[5]

Congress' decision to exclude federal jurisdiction over private actions cannot be undermined simply by bringing the same TCPA claim in federal court under a general jurisdictional statute. That was the decision in United Artists Theatre Circuit, Inc. v. FCC, 147 F. Supp. 2d 965 (D. Ariz. 2000), whcrc the plaintiff argued that, because the TCPA expressly authorized state court claims but did not prohibit federal claims, he should bc permitted to sue under Section 1331 as his claim arose under a Federal statute. The court rejected this argument:

> In the absence of an express jurisdictional grant to the federal courts in the statute, federal jurisdiction over private TCPA actions cannot alternatively be obtained under the general federal question jurisdiction statutc.

147 I:. Supp. 2d at 972. The court explained, "[b]y virtue of a specific assignment ofjurisdiction to state courts, Congress negates district court jurisdiction under § 1331." &(citing ErieNet, 156F.3d at 519).

> [I]n this case, Congress has trumped the general rule by specifically assigning iurisdiction

---

4 See Foxhall Realty Law Offices, Inc. v. Telecommunications Premium **Sews.**. Ltd., 156 F.3d 432, 438 (2d Cir. 1998); ErieNet, Inc. v. Velocity Net, Inc., 156 F.3d 513 (3d Cir. 1998); International Science & Technology Institute, Inc. v. Inacom Communications. Inc., 106 F.3d 1146 (4th Cir. 1997); Chair Kine. Inc. v. Houston Cellular Corp. 131 F.3d 507 (5th Cir. 1997); Nicholson v. Hooters of Augusta, Inc., 136 F.3d 1287 (1 lth Cir.), modified 140 F.3d 898 (1 Ith Cir. 1998).

5 The Court also noted the TCPA's legislative history and Fourth Circuit's analysis as supporting 'the conclusion that there was no federal jurisdiction, as Congress intended to provide a cost-efficient 'emedy for unsolicited facsimiles," quoting the TCPA sponsor's statement that private actions under the TCPA should "be treated as small claims best resolved in state courts designed to handle them, so long is the states allow such actions." Id. at 913 (citing International Science, 106 F.3d at 1152, and 137 Cong. Rec. S16205-06 (daily ed. Nov. 7 1991) (statement of Sen. Hollings)).

over the private 'I'CPAactions to state courts. Congress has the authority to restrict federal jurisdiction by statute to encompass less than the Constitution would allow. The TCPA clearly recognizes this power.

at 975 (emphasis added) (citations omitted).

It is settled in the Ninth Circuit that a congressional decision to exclude federal district court jurisdiction over certain matters "overrides" a more general grant ofjurisdiction that might otherwise apply. Owner-Operators Indep. Drivers Ass'n v. Skinner, 931 F.2d 582, 589 (9th Cir. 1991) ("[S]pec grants of exclusive jurisdiction to the courts of appeals override general grants ofjurisdiction to the district courts."). As the Ninth Circuit has explained, "[a] contrary holding would encourage circumvention of Congress's particular jurisdictional assignment." Id.; see Dougan v. FCC, 21 F.3d 1488, 1490-91 (9th Cir. 1994) ("[E]ven where Congress has not expressly conferred exclusive jurisdiction, a special review statute vesting jurisdiction in a particular court cuts off other courts' original jurisdiction in all cases covered by the special statute.").

In Carpenter v. Dep't of Transportation, 13 F.3d 313 (9th Cir. 1994), for example, the plaintif argued that section 504 of the Rehabilitation Act should allow a private claim in district court to challenge highway regulations and recover damages against the Federal Highway Administration ("FHA"), even though the Hobbs Act grants exclusive jurisdiction to the Court of Appeals to review such regulations, because the Hobbs Act does not provide for damages and was therefore inadequate Id. at 315-16. 'The Ninth Circuit rejected this argument, stating that "it would undermine the result th Congress intended when it adopted the Hobbs Act."

It would bc inconsistent with this intent to allow those who wish to challenge DOT regulations the opportunity to avoid the jurisdictional and time limitations of the Hobbs Act by simply invoking the Rehabilitation Act and adding damages to their complaint.

Id.[6]

---

[5] See Connors v. Amax Coal Co., 858 F.2d 1226, 1231 (7th Cir. 1988) ("Generally, when urisdiction to review administrative determinations is vested in the courts of appeals these specific, exclusive jurisdiction provisions preempt district court jurisdiction over related issues under other statutes.").

Here, plaintiff attempts to circumvent clear congressional intent to vest exclusive jurisdiction over private TCPA claims in courts other than federal district courts. Plaintiff tries to bring its entire TCPA case against Fax.com and its advertisers in federal district court, notwithstanding the plain language of the TCPA and Murphey, simply by naming a common carrier defendant and invoking Section *207*. But Section *207* is a general jurisdictional statute that requires a violation of some other provision of the **Act.** 47 U.S.C. § 207. It applies to a broad range of claims under the Act, not merely to one. In contrast, the jurisdictional subsection within the TCPA applies specifically and solely to private TCPA claims. 47 U.S.C. § 227(c)(5); Murphey. The two provisions cannot be reconciled where, like here, the plaintiff brings a private TCPA claim but sues under a statute generally creating jurisdiction over claims against common carriers. This is just like the plaintiff in Carpenter adding a damages claim and suing the FHA in district court, or the plaintiff in United Artists ignoring the exclusive jurisdiction of state courts over private TCPA claims and attempting to sue under a general statute.

Under these circumstances, the TCPA "trumps" Section 207 and does not permit jurisdiction over the complaint in this Court. The more general jurisdictional grant under Section 207 must give way to the specific, deliberate and much later decision of Congress to exclude federal district courts from private TCPA claims. See Hellon & Assocs., Inc. v. Phoenix Resort Corp., 958 F.2d 295,297 (9th Cir. 1992)("[T]o the extent that statutes can be harmonized, they should be, but in case of an irreconcilable inconsistency between them the later and more specific statute usually controls the earlier and more general one.").[7]

B. Even If Section **207** Could Supply Jurisdiction For Private TCPA Claims, Plaintiff Fails **To Allege** Facts Sufficient **To** Establish Carrier Liability.

Plaintiff's sole federal claim fails for another, independent reason. The complaint fails to allege facts sufficient to establish common carrier liability under fundamental principles of common carrier

---

[7] See Brown v. General *Sews.* Admin., 425 U.S. 820,833-35 (1976) (Section 717 of the Civil Rights Act is federal employees' exclusive remedy for job-related discrimination; "[i]t would require the suspension of disbelief to ascribe to Congress the design to allow its careful and thorough remedial scheme to be circumvented by artful pleading . . . . **[A]** precisely drawn, detailed statute pre-empts more general remedies.").

law and specific principles excluding common carrier liability under the TCPA

Plaintiffs Second Cause of Action alleges that Cox is subject to liability as a common carrier under Section 206 based solely on violations of the TCPA.[8] Section 206 provides in part that, "in case any common carrier shall do. or cause or permit to be done, any act, matter, or thing in this Act prohibited or declared to be unlawful . . . such common carrier shall he liable to the person or persons injured thereby . . . ." 47 U.S.C. § 206.

A claim relying on Section 206 cannot merely allege that a non-common carrier has violated a provision of the Act by using common carrier facilities. The plaintiff must show the common carrier itself is responsible for some conduct that "is the doing of something made unlawful by some provision of the act, or the omission to do something required by the act . . . ." Atlantic Coast Line R.R. v. Riverside Mills, 219 U.S. 186, 208 (1911) (same language in Interstate Commerce Act was inapplicable because claim did not stem from common carrier's violation of that Act); AT&T v. United Artists Payphone Corn.. 852 F. Supp. 221, 223 (S.D.N.Y. 1994) (Decisions construing the Interstate Commerce Act arc persuasive to determinations under Section 206, especially because Section 206 was "taken practically verbatim from the provisions of the Interstate Commerce Act then in force."), aff'd, 39 F.3d 411 (2d Cir. 1994).[9]

---

8 Plaintiff allcges that "Cox Business Services caused or permitted the violation of the TCPA by providing and servicing the telephone communications system used by Fax.com to fax broadcast Defendants' unsolicited advertisements. At all times, Cox Business Services possessed a high degree of involvement in and had actual notice of Fax.com's illegal fax broadcasting." Compl. ¶ 78.

9 See MCI l'eleconimuncations Corn. v. FCC, 917 F.2d 30, 38 (D.C. Cir. 1990) ("The Communications Act, of course, was based upon the [Interstate Commerce Act] and must be read in conjunction with it."). Congress confirmed this meaning of the language that appears in Section 206 when it revised Section 8 of the Interstate Commerce Act ("ICA"). Revised Interstate Commerce Act, 49 U.S.C. § 11705. As part of that 1978 revision "for clarity," Congress replaced the language "shall do, cause to be done, or permit to bc done any act, matter, or thing in this chapter required to be done" in ICA Section 8 with "an act or omission of that carrier in violation of this subtitle." H.R. Rep. No. 95-1395, at 191 (1978). This revision was "without substantive change [to] the Interstate Commerce Act." H.R. Rep. No. 95-1395, at 4 (purpose of hill was to restate Act without substantive change, and substitute "simple language. . . for awkward and obsolete terms . . ."). Plainly, the same language has the same meaning in Section 206.

1. Common Carriers Generally Are Not Liable For The Content Of Transmissions Of Others Over Their Networks.

Section 206 is entirely consistent with the fundamental principle of law that common carriers generally are not liable for the content of transmissions over their networks. By definition and mandate, common carriers must act as conduits, not gatekeepers or censors, and they cannot control or alter the content of the information they transmit.[10] In fact, common carriers have a legal duty to provide their services to the general public indiscriminately.[11]

> [T]he fundamental concept of a communications common carrier is that such a carrier makes a public offering *to* provide, for hire, facilities by wire or radio whereby all members of the public who choose to employ such facilities may communicate or transmit intelligence of their own design and choosing between points on the system of that carrier and between such points and points on the systems of other carriers connecting with it; and that a carrier provides the means or ways of communication for the transmission of such intelligence as the customer may choose to have transmitted so that the choice of the specific intelligence to be transmitted is the sole responsibility or prerogative of the customer and not the carrier.

In re Amendment of Parts 2, 91, and 99 of the Commission's Rules Insofar As They Relate to the Industrial Radiolocation Service, Report and Order, 5 F.C.C.2d 197,202 (1966) (quoting Frontier Broadcasting Co. v. J.F. Collier, 24 F.C.C. 251 (1958) (emphasis added)); 47 U.S.C. § 503(b)(2)(B) [carrier failing to carry traffic indiscriminately subject to damages and forfeitures).

Accordingly, courts routinely hold that common carriers are not liable for the content of

---

[10] See 47 U.S.C. § 153(43) & (44) (defining telecoinmunications carrier as common carrier, and telecommunications as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received."); FCC v. Midwest Video Corp., 440 U.S. 689,701 (1979) ("A common-carrier service in the communications context is one that 'makes a public offering to provide [communications facilities] whereby all members of the public who choose to employ such facilities may communicate or transmit intelligence of their own design and choosing . . . .'").

[11] See 47 U.S.C § 201(a) (requiring "every common carrier engaged in interstate or foreign communication by wire or radio to furnish such communication service upon reasonable request therefor . . ."); National Ass'n of Regulatory Util. Comm'rs v. FCC, 533 F.2d 601, 608 & n.32 (D.C. Cir. 1976) "An examination of the common law reveals that the primary sine qua non of common carrier status is a quasi-public character, which arises out of the undertaking 'to carry for all people indifferently. . . .'").

ransmissions in various contexts, including libel,[12] obscenity,[13] or copyright.[14] Even telegraph cases from nearly eighty years ago demonstrate that common carriers must provide their services promptly and impartially and cannot be expected to investigate and decide whether certain transmissions are appropriate. Brown, 294 F. at 170.[15]

2. Common Carriers Gcncrally Are Not Liable Under The TCPA For Thc Facsimile Transmissions Of Others Over Their Networks.

Congress did not intend to overrule this fundamental principle in enacting the TCPA. The plain language of the statute makes it unlawful for any person "to use any telephone facsimile machine . . . to send an unsolicited advertisement to a telephone facsimile machine." 47 U.S.C. § 227(b)(1)(C) (emphasis added). Common carriers provide the network over which advertisers, or perhaps fax broadcasters, actually "use" a fax machine to "send' an unsolicited advertisement. The legislative history of the TCPA also shows that Congress did not intend common carriers to be liable for facsimiles that others send over their networks:

> [R]egulations concerning the use of [facsimile] machines apply to the persons initiating the telephone call or sending the message and do not apply to the common carrier or othcr entity that transmits the call or message and that is not the originator [sic] controller of thc content of the call or message.

S. Rep. No. 102-178, at 9 (1991).

When formulating its rcgulations and standards of liability for common carriers under the TCPA

---

12 Common carriers cannot be liable unless the libeled party produces evidence that the carrier acted with actual or express malice, bad faith, or knowledge that the sender was acting in bad faith to defame another instead of to protect a legitimate or privileged interest. See, e.g., O'Brien v. Western Union Tel. Co., I13 F.2d 539, 543 (1st Cir. 1940); Western Union Tel. Co. v. Brown, 294 F. 167, 170 (8th Cir. 1923).

13 See Sable Communications of Ca.. Inc. v. Pacific Tel. & Tel. Co., Nos. 84-469, 84-549, 1984 U.S. Dist. LEXIS 19524 (C.D. Cal. **Feb.** 13, 1984).

14 Peter W. Huber et al., Federal Telecommunications Law 1308 & n. 471 (2d ed. 1999)

15 See also O'Brien, I I3 F.3d at 542 (to lawfully handle duties, telegraph companies cannot ponder content of messages to determine if they are lawful); Western Union Tel. v. Lesesne, 182 F.2d 135 (4th Cir. 1950) (large number of messages, speed expected, number of minor employees needed, and difficulty of legal questions shows impracticality).

the FCC looked to the obscenity context and Section 223 of the Act for guidance.[16] Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Report and Order, 7 F.C.C.R. 8752, 8779-80 (1992) ("FCC TCPA Order"). Under Section 223, common carriers cannot be liable for the transmission of obscene materials unless they originate the material, or have actual knowledge that the material to be transmitted has been adjudicated to be obscene and that the sender will continue such transmissions in the future. See Sable Communications, 1984 U.S. Dist. LEXIS 19524, at *7-8.[17]

The FCC adopted this very high threshold for common carrier liability in implementing the TCPA, relying on its prior order in Enforcement of Prohibitions Against the Use of Common Carriers for the Transmission of Obscene Materials, Memorandum Opinion, Declaratory Ruling and Order, 2 F.C.C.R. 2819, 2820 (1987) ("FCC Obscenity Order") which adopted the standard from Sable Communications. The FCC stated that "common carriers will not be held liable for the transmission of a prohibited facsimile message" absent "a high degree of involvement or actual notice of an illegal use and failure to take steps to prevent such transmissions." FCC TCPA Order, 7 F.C.C.R. at 8780.

[16] The court must show great deference to the agency charged with administering and implementing the statute involved. City of Seattle v. FERC, 923 F.2d 713, 715 (9th Cir. 1991).

[17] The legislative history of Section 223 clarifies this congressional intent:

> . . . [N]o common carrier is liable under this provision unless the carrier. . . originates the obscene transmission. As long as a common carrier is following the law and FCC regulations, it could not have knowledge of any transmissions by other parties. Therefore, [carriers] would not be in any way liable for merely transmitting obscene or offensive messages in the capacity of a common carrier.

129 Cong. Rec. H 10559 (Part II, daily ed., Nov. 18, 1983) (statement of Rep. Bliley).

> All common carriers are prohibited from listening to, or affecting the content of the telephone conversations; therefore the knowingly element will never be met by any common carrier which is obeying the law and the FCC regulations. . . . [I]t is not the intent of Congress that a common carrier be prosecuted under this amendment when it is otherwise abiding by the law and FCC regulations and when the telephone calls which are found to violate section 223 are at the initiative of a party which has no financial or other relationship with the common carrier other than that of carrier-customer.

129 Cong. Rec. S 16866, 16867 (Part II, daily ed. Nov. 18, 1983) (statement of Sen. Trible).

In 1995, the FCC clarified this standard as it applied to fax broadcasters who may act like "common carriers," emphasizing that even fax broadcasters (like Fax.com) generally are not liable under the I'CPA. "We clarify that the entity or entities on whose behalf facsimiles are transmitted are ultimately liable for compliance with the rule banning unsolicited facsimile advertisements, and that fax broadcasters are not liablc for compliance with this rule." In re Rules and Rcyulations Implementing the Telephone Consumer Protection Act of 1991, Memorandum Opinion and Order, 10 F.C.C.R. 12391, 12407 (1995). The FCC noted that its rule was entirely consistent with the TCPA's legislative history. Id. at 12407 n.90 (quoting S. Rep. No. 102-178, at 9 (1991).)

The FCC provided further clarification of the TCPA standard for liability as it applied to fax broadcasters in its Notice of Apparent Liability to Fax.com, referenced in the complaint.[18] In addressing the proper standard, the FCC confirmed its prior rulings that "the prohibition on sending unsolicited fax advertisements does not apply *to* fax broadcasters that operate like common carriers by mcrcly transmitting their customers' messages without determining either content or destination." NAL ¶ 13 (citations omitted) (attached hereto as Ex. U). More recently, the FCC identified several factors it used in tentatively determining that Fax.com had a "high degree of involvement" in the transmission of unsolicited advertisements on behalf of advertisers: (I) that "Fax.com uses its own extensive distribution list of tclephone facsimile numbers to send its clients' advertisements," (2) that it "knowingly sends advertisements to such numbers" without regard to whether the recipient either had granted permission or had a "an established business relationship with the advertiser or Fax.com," and *(3)* that it "apparently reviews the text of its clients' advertisements, not only to assist with graphic design, but also to assess content." NAL ¶ 14 (citations omitted) (Ex. B).

---

18 The Court may consider the FCC's citations and NAL without converting this to a motion for summary judgment because plaintiff referenced these documents in its complaint (¶¶ 28-33) and they are central to plaintiffs claims. See, e.g., U.S.A. NutraSource, Inc. v. CNA Ins. Co., 140 F. Supp. 2d 1049, 1053 (N.D. Cal. 2001); Ting v. AT&T, 182 F. Supp. 2d 902, 919 (N.D. Cal. 2002); Mack v. South Bay Beer Distribs., Inc., 798 F.2d 1279, 1282 (9th Cir. 1986).

3. Plaintiff Fails To Allege Facts Sufficient To Show That Cox Has Violated The TCPA By Any Unlawful Act Or Omission.

None of these facts are alleged in the complaint against Cox as a common carrier subject to liability under Sections 206 and 207. The complaint alleges only that Cox serves Fax.com as a common carrier, not that it is involved in the fax broadcasting business (e.g., developing lists of fax numbers, providing those numbers for advertisers' use, advising customers on content). The complaint simply alleges that Cox provides fast, efficient and reliable telecommunications services, which Fax.com needs to run its business, and that Cox is aware of Fax.com's broadcast fax business. (Compl. ¶¶ 35-38.) As shown above, however, simply providing transmission facilities and services to a customer who might violate the law cannot constitute violation of the TCPA. FCC TCPA Order, 7 F.C.C.R. at 8780.[19] Thus, even assuming Fax.com's conduct might violate the ICPA, the complaint fails to state a federal claim against Cox based on a "high degree of involvement" in illegal TCPA conduct.

The complaint also fails to state a claim that Cox had actual notice of illegal conduct and failed to take proper steps to prevent it. It is important to note that, despite plaintiffs' suggestion to the contrary (see Compl. ¶ 1), fax broadcasting is not illegal per se. The TCPA does not prohibit the transmission of unsolicited facsimile advertisements with permission, or by invitation, or if the fax broadcaster has an established business relationship with the fax recipient. See FCC TCPA Order at 8779 n.87. Furthermore, the TCPA does not ban the transmission of other types of unsolicited faxes at all. See 47 lJ.S.C. § 227(a)(4) (defining unsolicited advertisement as "any material advertising the commercial availability or quality of any property, goods or services"). Thus, courts have held that the transmission of unsolicited political messages and advertisements offering employment do not violate the TCPA.[20]

---

19 Plaintiff's conclusory allegations and arguments (see Compl. ¶¶ 35, 39, 78 (Cox had "a high degree ofinvolvement in . . . Fax.com's illegal fax broadcasting")) *are* entitled to no weight. See Schmier v. United States Ct. of Appeals for the Ninth Cir., 279 F.3d 817, 820 (9th Cir. 2002) ("conclusory allegations of law and unwarranted inferences" cannot defeat motion to dismiss).

20 See Missouri ex rel. Nixon v. American Blast Fax Inc., 196 F. Supp. 2d 920, 925-26, 931 (E.D. Mo. 2002) (political messages, jokes and polls sent by unsolicited fax are not covered by the TCPA); Lutz Appellate Sews., Jnc. v. Curry, 859 F. Supp. 180, 181 (E.D.Pa. 1994) (advertisement for job

In addition, as a matter of law and logic, "actual notice of illegal conduct" requires a prior adjudication that the conduct is illegal and a basis to know that the conduct will continue in the future. See Sable Communications. 1084 U.S. Dist. LEXIS 19524, at *7-8 (carriers cannot be liable for transmission of obscene inaterials because they lack knowledge of the content of future transmissions). Complaints, lawsuits and tentative conclusions do not suffice. Thus, even if Fax.com were ordered to ceasc certain conduct, Cox is entitled to presume that Fax.com will comply. The FCC adopted these principles for common carriers in connection with the transmission of obscene materials, and again adopted them under the TCPA. See FCC Obscenity Order, 2 F.C.C.R. at 2820 ("Unless an MDS common carrier has actual notice that a program has been adjudicated obscene. . . it will not be subject to advcrsc agency action."); FCC TCPA Order, 7 F.C.C.R. at 8780.

Here, the complaint fails to allege facts sufficient to show that Cox had actual notice of illegal conduct. To the contrary. plaintiff cites the NAL, which only tentatively concludes that there has been a violation. NAL at ¶ 27. Fax.com has not yet been required to respond to the NAL. See 47 U.S.C. § 502(b)(4) (requiring opportunity for response before any forfeiture). In fact, a federal court has enjoinec the NAL (pending appeal) and ordered the FCC to "cease and desist" from proceeding against Fax.com or its customcrs. on the ground that thc TCPA violates Fax.com's constitutional rights. State of Missouri v. American Blast Fax, Inc., et al., No. 4:00CV933-SNL (Aug. 29, 2002). Thus, the complaint does not allege that there has been any adjudication that Fax.com is using Cox's network to violate the TCPA. And there is also no allegation that Cox ever received any citations (it did not) like those issued to Fax.com stating that the FCC believed Cox's conduct may violate the TCPA.[21]

Finally, plaintiff's conclusory allegation that Cox "failed to take steps to prevent [Fax.com's]

---

opportunities does not fall within the TCPA's definition of "unsolicited advertisement" and is not prohibited under the statute).

[21] Even the FCC's citations to Fax.com are not adjudications. (Compl. ¶¶ 28-33.) By their terms, he citations do not conclude that Fax.com is engaged in any unlawful activity. See, e.g., Citation to Kevin Katz, dated May 31. 2001 at 1 ("This is an official citation . . . for possible violations of the TCPA . . . .")(attached hereto as Ex. A). And none of them even mentions Cox.

transmissions" (Compl. ¶ 39) is legally unsound. In fact, common carriers have no duty to investigate customer activity or to ensure lawful use of their facilities. See FCC Obscenity Order, 2 F.C.C.R. at 2820 (Carriers "do not have an obligation affirmatively to determine whether the use of their facilities by customers will be for a lawful purpose. . . ."); Sprint Corp. v. Evans, 818 F. Supp. 1447, 1457 (M.D. Ala. 1993) ("Currently, under federal law, common carriers do not have an aflirmative obligation to investigate whether their facilities are being used by customers for a lawful purpose.").[22] To the contrary. *Cox* has a legal duty to continue to provide its common carrier service to all customers indiscriminately, 47 U.S.C. § 201(a), and cannot refuse to carry traffic based on allegations of illegality. See Howard v. America Online Inc., 208 F.3d 741,752 (9th Cir.) **("A** common carrier does not 'make individualized decisions. . .'"), cert. denied, 531 U.S. 828 (2000); People v. Brophy, 120P.2d 946,956 (Cal. Ct. App. 1050) ("The telephone company has no more right to refuse its facilities to persons because of a belief that such persons will use such service to transmit information that may enable recipients thereof to violate the law than a railroad company would have to refuse to carry persons on its trains because those in charge of the train believed that the purpose of the persons so transported in going to a certain point was to commit an offense . . . .").[23] Thus, absent a statutory requirement,[24] a

---

22 Cf. AT&T Co. v. lntrend Ropes &Twine. Inc., No. 93-2266, 1996 U.S. Dist. LEXIS 16991 (C.D. Ill. 1996) (carrier's alleged failure to prevent additional instances of toll fraud after being informed did not constitute unreasonable act because carrier exerts no control or authority over customer's system and cannot prevent further fraud).

23 See also Mason v. Western Union Telegraph Company, 52 Cal. **App.** 3d 429, 437 (1975) ("California policy, case law and statute, all point to a vital need not to: (1) burden those who supply telegraph service with the duty to investigate messages prior to transmission, or (2) endow a private corporation (even though a public utility) with the power to monitor and obstruct the right of all persons to freely communicate.")

24 Even with illegal gambling, a carrier can only refuse service after official notification from government officials that a customer is providing gambling information in violation of federal law. See 18 U.S.C. § 1084(d) ("When any common carrier . . . is notified in writing by a . . . law enforcement agency, acting within its jurisdiction. that any facility furnished by it is being used or will be used for the purpose of transmitting or receiving gambling information . . . it shall discontinue or refuse, the leasing, furnishing, or maintaining of such facility . . . .").

court order requiring Cox to terminate service,[25] or an adjudication of illegal conduct and knowledge that it will continue, there is no legal basis or duty for Cox to terminate common carrier service to a customer based on alleged illegal conduct. See also Goldin v. Public Utilities Comm'n, 592 P.2d 289, 293-94. 304 (Cal. 1979) ("A company providing telephone services to the public is a common carrier, and as such may not discontinue scrviccs without good cause.")

C. The Court Should Dismiss Plaintiff's Remaining Claims.

Plaintiffs remaining claims must be dismissed for several reasons. First, "when original jurisdiction does not exist for the principal claim, federal courts may not exercise supplemental jurisdiction over the remaining pendent claims. Simply put, failure of original jurisdiction precludes application of supplemental jurisdiction." Randolph v. Budget Rent-A-Car, 97 F.3d 319,329 (9th Cir. 1996). Second, all the remaining claims against Cox should be dismissed, because they all depend upon the alleged violation of the TCPA for the "improper," "illegal" or "inequitable" conduct asserted,[26] and the complaint fails to state a TCPA violation against Cox, as shown above. Third, plaintiffs TCPA claim must be dismissed, because Section 1367 "confers a general grant ofjurisdiction that is canceled when another federal statute expressly provides otherwise." United Artists 'Theatre Circuit, Inc. v. FCC, 147 F. Supp. 2d 965, 976 (D. Ariz. 2000) ("[B]y the express terms of section 1367(a), which allows supplcmental jurisdiction only as long as another statute does not provide otherwise . . . supplemental jurisdiction lover plaintiff's TCPA claim] is unavailable."); 28 U.S.C. § 1367(a). Here, the TCPA does provide otherwise. United Artists. 147 F. Supp. 2d at 976.

---

25 Under California law and the tariff rules of the California Public Utilities Commission, a common carrier can only disconnect service for alleged illegal conduct upon written notification from a law enforcement agency. See California Public Utilities Commission, Opinion After Further Hearing, Case No. 4930, Decision No. 91 I88 (Appendix A 1980) ("Any communications utility operating under the jurisdiction of this Commission shall refuse service to a new applicant and shall disconnect existing service to a customer upon receipt from any authorized official of a law enforcement agency of a writing, signed by a magistrate, as defined by Penal Code Sections 807 and 808, finding that probable cause exists to believe that the use made or to be made of [he service is prohibited by law. . . .").

26 (See Compl. ¶¶ 66-74 (First Claim, TCPA), ¶ 82 (Third Claim, Section 17200 Unlawful Business Practice), ¶ 88 (Fourth Claim, Unjust Enrichment).)

Finally, the private TCPA claim must be dismissed because the court cannot logically exercise jurisdiction over a claim that does not exist. It appears that California does not permit private TCPA claims in its courts,[27] which is a decision within its discretion under the TCPA. 47 U.S.C. § 227(b)(3).[28] See Murphey, 204 F.3d at 914 ("A litigant may find that there is no remedy in state court, but that does not . . . confer federal jurisdiction over a private action."). As a result, the Court should decline supplemental jurisdiction over the TCPA claim.[29] At a minimum, whether such a claim exists under California law presents a novel and complex issue of state law that should not be resolved in the first instance in this Court. 28 U.S.C. § 1367(c)(1); Acri v. Varian Assocs., Inc., 114 F.3d 999, 1001 (9th Cir.), supplemented, 121 F.3d 714 (9th Cir. 1997).[30]

---

[27] Kaufman & Vans, Inc. v. ACS Systems, Inc.. et al., Case Nos. BC240588 & BC240573 (Los Angeles County, Superior Court, filed Dec. 19, 2001) (Section 227(b)(3) "requires states to affirmatively take steps to authorize a private right of action under the TCPA . . . ." which California has not done.); Bonime v. Primetime TV, LLC, Case No. BC269742 (Los Angeles County, Superior Court, filed Sept. 4, 2002) ("private cause of action for violation of [TCPA] does not exist in the State of California"). Cal. Bus. & Prof. Code § 17538.4 establishes a separate regime to address unsolicited facsimiles that does not authorize private TCPA claims, The statute was amended on September 19, 2002 (after plaintiffs filed this suit) in AB 2944, effective January 1, 2003, removing references to facsimiles but still failing to authorize explicitly private claims under the TCPA. It remains to be seen whether private TCPA claims will be permitted in California in the future. It is also noteworthy that, under the current law, consistent with federal law, actions against common carriers are barred by the definition of "fax" or "cause to be faxed" as excluding transmissions by "telecommunications utilities" to the extent they merely carry transmissions over their networks. See Cal. Bus. & Prof. Code § 17538.4(f).

[28] The TCPA permits States to bring civil actions on behalf of their residents, 47 U.S.C. §227(f); Murphey, 204 F.3d at 914, and parties may pursue relief at the FCC. Id.

[29] Mcndiola v. South San Francisco Unified School District, No. C-95-2793, 1996 WL 53635, at *5-6 (N.D. Cal. Jan. 31, 1996) (declining supplemental jurisdiction because unclear whether "indcpendent privatc right ofaction" exists); Forsberg v. Pac. Northwest Bell Tel. Co., 840 F.2d 1409, 1421 (9th Cir. 1988) (proper to decline supplemental jurisdiction when court unsure whether state legislature "intended to allow a private right of action under the statute"); Sutta ex rel. Sutta v. Acalanes Union High School District, No. C01-1519 BZ, 2001 WL 1720616, at *5 (N.D. Cal. Oct. 3, 2001) (whether private claim existed appeared to be novel question of law),

[30] See also Qwest Communications Corp. v. City of Berkeley, 146 F. Supp. 2d 1081, 1101-02 (N.D. Cal. 2001) (declining supplemental jurisdiction because state preemption claim partially based on new California statute, yet to be addressed by relevant case law); City of Auburn v. Qwest Corporation, 260 F.3d 1160, 1174-75 (9th Cir. 2001) (declining review of whether local telecommunications ordinances violate new Washington laws where issues were matters of first impression and no state

D. Even If There Were A Federal Claim, The Court Should Dismiss Based On The Primary Jurisdiction Of The FCC.

Plaintiff's theory of common carrier liability would raise disturbing questions of national consequence if it had any validity. Common carriers are not censors or law enforcement tools, and no one wants them to be. As shown above. Congress had no intention of altering this fundamental princi in enacting the TCPA, and neither did the FCC in implementing it. Plaintiff's theory would conflict with the TCPA and the FCC's orders implementing it. Accordingly, if the Court finds federal jurisdiction and does not dismiss under Rule 12(b)(6), the doctrine of primary jurisdiction would apply squarely in this case. The complaint presents an issue (common carrier liability for unsolicited fax advertisements sent by others) that Congress placed within the regulatory jurisdiction of the FCC -- the administrative body with authority over both the telecommunications industry and the TCPA -- and the FCC has established a comprehensive regulatory scheme to govern both areas that requires expertise a uniformity in administration. In fact, the FCC has initiated a rulemaking that will address, among othe things. the issue of common carrier liability under the TCPA. That administrative process, not regulation by judicial decree, should govern any change in the standards for common carriers under the TCPA.

"The doctrine of primary jurisdiction . . . is concerned with promoting proper relationships between the courts and administrative agencies charged with particular regulatory duties." United Stat v. Yellow Freight Sys., Inc., 762 F.2d 737, 739 (9th Cir. 1985) (quoting United States v. Western Pac. R.R., 352 U.S. 59.63 (1956)). Under this doctrine, courts may route certain issues "to the agency charged with primary responsibility for governmental supervision or control of the particular industry activity involved." United States v. General Dynamics Corp., 828 F.2d 1356, 1362 (9th Cir. 1987) (quoting Port of Boston Marine Terminal Ass'n v. Rederiaktiebolaget Transatlantic, 400 U.S. 62, 68 (1970)). Deferral to an agency's primary jurisdiction is dictated whenever a court is faced with:

> (1) the need to resolve an issue that (2) has been placed by Congress within the jurisdiction of an administrative body having regulatory authority (3) pursuant to

court had published opinion addressing new law), cert. denied. 122 S. Ct. 809 (2002).

it statute that subjects an industry or activity io a comprehensive regulatory scheme that (4) requires expertise or uniformity in administration.

Cost Mgmt. Servs. v. Washington Natural Gas Co., 99 F.3d 937,949 (9th Cir. 1996) (quoting General Dynamics Corp., 828 F.2d at 1362). **All** of these factors are fully satisfied here.

The Complaint alleges that Cox may be held liable for violations of the TCPA based on its conduct as a common carrier operating a telecommunications network. The FCC's pending rulemaking evaluates the TCPA regulatory framework governing these questions -- referring specifically to the activities of Fax.com -- and declares the FCC's intent to determine whether new rules are needed to address such activities, to determine whether they violate the TCPA, and to allocate responsibility among the parties for regulatory compliance. (Notice ¶¶ 37-40.)

- 'The Notice discusses fax advertising, including clarifying the "established business relationship" exemption and "what constitutes prior express invitation or permission for purpose! of sending an unsolicited fax." (Id. ¶¶ 38-39.) **The FCC's clarification of what constitutes prohibited fax advertising plainly could determine the outcome here.**

- The Notice questions whether the existing rules are sufficient to "inform the business community about the general prohibition on unsolicited fax advertising" and its possible applications to Fax.com and similarly-situated entities. (Id.) **A finding that existing rules are unclear regarding their application to the activities of Fax.com would alone negate plaintift's theory that Cos had any "knowledge" that Fax.com was violating the TCPA.**

- The Notice assumes that "[i]n the absence of a high degree of involvement or actual notice of an illegal use and failure to take steps to prevent such transmissions, common carriers will not be held liable for the transmission of a prohibited facsimile message," (id. (internal quotes omitted)), and asks whether the FCC should specify by rule the activities under this standard that would trigger liability under the TCPA. (Id.) **Resolution of these questions could show that Cox cannot be held liahlc as a common carrier for Fax.com's activities.**

It is thus highly likely that the FCC's proceeding would render this case moot or, at a minimum, materially aid the Court in resolving the complex and novel issues the complaint presents

Plainly, Congress delegated to the FCC broad authority to establish a comprehensive policy for and regulation of common carriers in their provision of telecommunications services, 47 U.S.C. §§ 151, 201-205,[31] and also entrusted to the FCC the duty to administer the TCPA, 47 U.S.C. § 227(b)(2),

---

[31] Pacific Tel. & Tcl. Co. v. MCI Telecomms. Corp., **649** F.2d 1315, 1321 (9th Cir. 1981); AT&T

(c)(2). Thus, the FCC has a duty to establish comprehensive national policies and rules for the regulation of common carriers and **fax** advertising activities.

Deferral to the FCC is particularly appropriate here because the case implicates the administration of both these areas of communications policy and regulation -- the regulation of common carriers to ensure an efficient national telecommunications network and the regulation of telemarketers to balance privacy rights with the continued viability of legitimate business practices. Both areas establish complex, complementary frameworks in need of uniform application, which requires allowing an administrative body to apply its "special competence." Writers Guild of Am., West Inc. v. ABC, 609 F.2d 355, 362 (9th Cir. 1979). Resolution of the issues raised here requires national policymaking decisions within the special competence, expertise and responsibility of the FCC. 1992 TCPA Order, 7 F.C.C.R. at 8754; Notice ¶¶ 1, 37. The FCC initiated its rulemaking precisely because evolving telemarketing practices like those of Fax.com raise new policy and regulatory questions that preclude simple application of the 'I'CPA and existing rules by courts or affected patties. (See Notice ¶¶ 11, 40.)

In an analogous case, the court deferred to the FCC's primary jurisdiction to determine whether a carrier should be held liahlc for its customer's use of its telecommunications services to transmit sexually explicit messages. The court explained as follows:

> [T]hc FCC is "expert" at determining the rights and duties of a common carrier under the Act. In addition to referral being appropriate under the primary jurisdiction doctrine in order to take advantage of "the expert and specialized knowledge" of the FCC, it is also appropriate as a means of "ensuring uniformity and consistency in the regulation of business entrusted to a particular agency." . . . Moreover, determining the appropriate safeguards against the misuse of common carriers' facilities by subscribers. . . is a complex regulatory issue which can best be decided in the first instance by an agency with a thorough understanding of the economics and technology of the telecommunications industry.

Sprint Corp v. Evans, 846 F. Supp. 1497, 1508 (M.D. Ala. 1994) (citations omitted).[32] The same

---

Corp. v. PAH, Inc., 935 F. Supp. 584, 590 (E.D. Pa. 1996); Phonetele, Inc. v. AT&T Co., 664 F.2d 716, 721-23 (9th Cir. 1981), modified, Nos. 77-3877, 77-2936, 1982 WL 11277 (9th Cir. Mar. 15, 1982).

[32] The court further found that deferral to the FCC was appropriate because (a) the issue of a carrier's liability for a customer's use of telecommunications services "is not a 'single event,' but rather involves ongoing business relationships maintained by . . . common carriers with their subscribers,

principles apply here to support deferral to the FCC, especially because plaintiffs unprecedented theory of common carrier liability would affect the public.[33]

Finally, dismissal rather than a stay is appropriate, because no purpose is served by holding the case in abeyance, and no party will be prejudiced by a dismissal without prejudice. See Far East Conference v. United States, 342 U.S. 570, 575 (1952). Plaintiff is free to participate in the FCC's rulemaking proceeding, which was initiated after the complaint was filed, and the FCC will protect the interests of the public, including the members of the purported national class. In any event, a "similar suit is easily initiated later." Id. at 577.

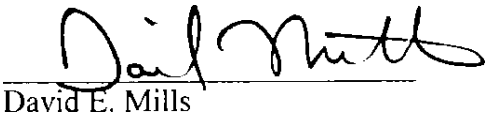
---

requiring 'continuing supervision' by the FCC;" (b) "[w]hile the FCC has spoken generally to these issues on prior occasions, the court cannot conclude that the FCC's position is 'sufficiently clear' as it applies to" common carriers liability; and (c) these issues are central, not "peripheral," to the litigation. Id. (citations omitted).

[33] See also GTE.Net LLC v. Cox Communications, Inc., 185 F. Supp. 2d 1141 (S.D. Cal. 2002) (deferring to FCC to determine carriage obligations of cable Internet service provider, based on Ninth Circuit's finding that Congress delegated details of telecommunications policy to FCC); MCI Communications Corp. v. AT&T Co., 496 F.2d 214, 219-24 (3d Cir. 1974) (applying primary jurisdiction where resolution of issues involved "comparative evaluation of complex technical, economic, and policy factors, as well as consideration of the public interest").

WHEREFORE, Cox respectfully requests that the Court dismiss the complaint **for** lack of subject matter jurisdiction or, in the alternative, for failure to state a claim. Should the Court find subject matter jurisdiction and decline to dismiss for failure to state a claim, Cox respectfully requests that the Court dismiss the complaint based on the primary jurisdiction of the Federal Communications Commission.

Respectfully submitted,



David E. Mills
Kara D. Little
Dow, Lohnes & Albertson, PLLC
1200 New Hampshire Ave., N.W., # 800
Washington, D.C. 20036
(202) 776-2000
(202) 776-2222 (facsimile)

-and -

Richard R. Patch
Coblentz, Patch, Duffy & Bass, LLP
222 Kearny Street, Seventh Floor
San Francisco, CA 94108
(415) 391-4800
(415) 989-1663 (facsimile)

Counsel for Defendant Cox Business Services

October 11, 2002